DOCKET FILE COPY ORIGINAL

NEW YORK, NEW YORK

DENVER, COLORADO

ARNOLD & PORTER
1200 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036-6885
(202) 872-6700
CABLE: "ARFOPO"
FACSIMILE: (202) 872-6720
TELEX: 89-2733

LOS ANGELES, CALIFORNIA

TOKYO, JAPAN

WILLIAM E. COOK, JR.
DIRECT LINE: (202) 872-6996

June 17, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-266

Dear Ms. Searcy:

Please find enclosed, on behalf of the National Association of Telecommunications Officers and Advisors, et al., an original and nine copies of Further Comments to be filed in the Commission's proceeding in MM Docket No. 92-266.

Any questions regarding this submission should be referred to the undersigned.

Sincerely,

William E. Cook Jr.

William E. Cook, Jr.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	**MM Docket No. 92-266**
Rate Regulation	

TO: The Commission

FURTHER COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

Norman M. Sinel
Patrick J. Grant
Stephanie M. Phillipps
William E. Cook, Jr.

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for the Local Governments

June 17, 1993

SUMMARY

For purposes of calculating rates for competitive systems under the competitive rate differential calculation, the Commission should exclude, or give less weight to, rate data submitted in response to the Commission's rate survey by cable systems that the Commission identified as having penetration rates of less than 30 percent. The 1992 Cable Act does not require the Commission to include rate data for such cable systems in calculating the competitive rate differential. In fact, the 1992 Cable Act makes clear that Congress viewed such cable systems as having undue marketpower if they do not face competition from another multichannel video programming distributor. To the extent that the Commission believes it must take into account rates charged by cable systems with less than 30 percent penetration rates, the Commission, at a minimum, must discount such rates in determining the competitive rate differential since a disproportionate number of these cable systems serve smaller franchise areas, which the Commission found have higher costs than systems serving larger franchise areas.

Cable operators should be required to immediately comply with any further rate reductions the Commission orders as a result of a recalculation of the competitive rate differential as suggested above.

SUMMARY

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

TO: The Commission

FURTHER COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, and the National Association of Counties (collectively, the "Local Governments")[1] hereby submit these further comments in the above-captioned proceeding.

[1] The National Association of Telecommunications Officers and Advisors represents local franchising authorities in more than 4,000 local franchise jurisdictions, which collectively regulate cable television systems that serve an estimated 40 million cable subscribers. The U.S. Conference of Mayors represents the more than 950 cities with populations exceeding 30,000 residents. The National Association of Counties represents the approximately 2,000 counties across the nation.

INTRODUCTION

The Federal Communications Commission ("Commission") seeks comment on whether it may exclude, or give less weight to, rates charged by cable systems with penetration rates of less than 30 percent in a franchise area in calculating the competitive rate differential between cable systems subject to "effective competition," as defined in Section 623(l), and those systems that are not subject to such competition.[2] The Commission noted that when it counted cable systems with less than 30 percent penetration as competitive systems, it calculated a competitive rate differential of only 10 percent. Report and Order at ¶ 560. When such cable systems are not counted as competitive cable systems, the competitive rate differential almost tripled, going from 10 to 28 percent.

Local Governments believe that the Commission may exclude, or give less weight to, rate data submitted in response to the Commission's rate survey by cable systems that the Commission identified as having

---

[2] Report and Order and Notice of Proposed Rulemaking In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266 (released May 3, 1993) ("Report and Order") at ¶ 562.

penetration rates of less than 30 percent for the following reasons:

First, the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[3] does not require the Commission to include rate data for cable systems with low penetration rates in calculating the competitive rate differential between competitive and noncompetitive cable systems. In fact, the 1992 Cable Act makes clear that Congress considered only cable systems facing competition from another multichannel video programming provider as subject to competition, and viewed cable systems -- including those with low penetration rates -- as having undue marketpower if they dod not face such competition.

Second, to the extent that the Commission takes into account rates charged by cable systems with less than 30 percent penetration rates, the Commission, at a minimum, must discount such rates in determining the competitive rate differential, given that these systems disproportionately serve small franchise areas. For example, in comparison with cable systems that the Commission determined faced "effective competition" from another multichannel video programming distributor, more than twice as many cable systems with penetration rates

---

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

of less than 30 percent serve franchise areas with fewer than 1,000 subscribers. Given the Commission's finding that smaller systems' costs per subscriber may be higher than larger systems -- thus entitling them to a higher benchmark rate -- the Commission should give less weight to rates charged by cable systems with low penetration levels in determining the competitive rate differential to adjust for the disproportionate number of such cable systems that serve small franchise areas.

The Commission must recalculate its benchmark rates based on a recalculation of the competitive rate differential as suggested above in order to achieve Congress' mandate that cable subscribers pay only a "reasonable" rate for cable service. Cable operators should be required to immediately comply with any further rate reductions the Commission orders as a result of such a recalculation.

DISCUSSION

I. The Commission May Lawfully Exclude from the Competitive Rate Differential Calculation Those Cable Systems with Penetration Rates of Less than 30 Percent in a Franchise Area

Section 623 only requires that the Commission "take into account" or "consider" the rates for cable systems subject to "effective competition" in determining reasonable rates for basic and cable

programming service tiers. Sections 623(b)(2)(C)(i) and 623(c)(2)(B). The rates charged for cable service by

consumer interests are protected in the receipt of cable service" where "cable systems are not subject to effective competition." Section 2(b)(4), 1992 Cable Act.

The 1992 Cable Act, then, makes clear that cable systems with penetration rates of less than 30 percent have undue market power if such systems do not also face "effective competition" from another multichannel video programming provider. The 10 percent competitive rate differential calculated by the Commission, therefore, is inherently "unreasonable" since it is based on rates charged by such cable systems.

In light of the above statutory provisions, it is clear that although Congress intended to exempt cable systems with penetration rates of less than 30 percent from rate regulation, it did not intend for such systems to be taken into account as competitive systems in determining "reasonable" rates for cable service. Given Congress' recognition that these systems may not be subject to <u>actual</u> competition, it appears that Congress may have excluded such systems from rate regulation on other policy grounds. For example, Congress clearly intended to protect new cable systems from certain regulation. The 1992 Cable Act, for example, requires that franchising authorities "allow [a] cable system a reasonable period of time to become capable of providing

cable service to all households in the franchise area." Section 621(a)(4)(A). Consistent with a purpose of protecting new cable systems, Congress may have included cable systems with less than 30 percent penetration rates under the definition of "effective competition" in order to give them "a reasonable period of time" to serve a subscriber base sufficient to cover their costs before subjecting them to rate regulation.

Rather than speculating on why Congress might have included noncompetitive cable systems under the "effective competition" definition, however, the Commission should focus instead on how to take into account rates charged by cable systems subject to "effective competition" for the purpose of establishing "reasonable" cable rates. As suggested above, the Commission should take into account only those cable systems which face "effective competition" from another multichannel video programming provider, as defined under Section 623(l)(1)(B) of the "effective competition" definition, in determining a "reasonable" rate. The exclusion of cable systems with penetration rates of less than 30 percent from such a determination is not prohibited by the 1992 Cable Act.

II. If the Commission Determines that It Must Count Cable Systems with Low Penetration Rates As Competitive Systems for Purposes of Calculating the Competitive Rate Differential, It Should Discount the Weight Accorded the Rates Charged By Such Systems To Account for the Disproportionate Number of Such Systems Serving Small Franchise Areas

As argued above, the Commission should not count cable systems with low penetration rates as competitive cable systems for purposes of calculating the competitive rate differential. In the event that the Commission determines that such systems must be included in determining the competitive rate differential, the Commission should discount the weight accorded rates charged by such systems, given that a disproportionate number of them serve small franchise areas.

As noted above, the rates charged by systems subject to "effective competition" for cable service is just one of the factors the Commission must consider in determining what is a reasonable rate. The Commission also is required to take into account, among other factors, rates charged by "similarly situated" cable systems and the cost of providing cable service. Sections 623(b)(2)(C)(ii) and (c)(2)(A). As the Commission has recognized, it should balance these statutory factors in determining reasonable rates. Local Governments believe that it must also balance

these factors in calculating the competitive rate differential.

The 79 respondents to the Commission's rate survey that the Commission identified as serving less than 30 percent of the households in a franchise area disproportionately serve small franchise areas. For example, of these 79 respondents, almost half -- 46 percent -- serve franchise areas with 1,000 or fewer subscribers. This percentage is more than twice as high as that for cable systems that the Commission identified as facing "effective competition" from another multichannel video programming distributor. Of those systems, only 19.5 percent (9 out of 46) reported serving a franchise area with 1,000 or fewer subscribers.

The disproportionate number of cable systems with low penetration rates serving small franchise areas is of significant concern, given the Commission's finding that smaller systems' costs are significantly higher than larger systems -- thus entitling them to a higher benchmark rate. Appendix E at ¶ 27. To ensure that the competitive rate differential is not artificially deflated, the Commission should discount the weight given to rates charged by cable systems with low penetration levels to adjust for the disproportionate number of such cable systems serving small franchise

areas. Such an adjustment should provide a more accurate competitive rate differential.

III. The Commission Should Recalculate the Competitive Rate Differential and Require Cable Operators to Immediately Comply with Any Further Rate Reductions Ordered as a Result

For the reasons stated above, Local Governments urge the Commission to recalculate the benchmark rates for regulated cable systems based on the 28 percent competitive rate differential it calculated when cable systems with penetration rates of less than 30 percent are not included in determining the average rate for cable systems subject to "effective competition."[4] Rates based on the 28 percent competitive rate differential should more accurately reflect the rate a truly competitive cable system would charge and should eliminate most of the monopoly component in current cable rates identified in numerous studies.[5]

---

[4] At a minimum, if the Commission concludes that the 1992 Cable Act requires that it consider the rates charged by cable systems with low penetration rates in establishing "reasonable" cable rates, the Commission must discount the weight accorded such systems in its competitive rate differential calculation to account for the disproportionate number of these systems that serve small franchise areas.

[5] For example, the U.S. Department of Justice estimated that approximately 45-50 percent of basic rate increases since rate deregulation in 1986 is attributable to the cable industry's market power. Robert Rubinovitz, "Market Power and Price Increases for Basic Cable Service Since Deregulation" (U.S. Department of Justice, Antitrust Division, Economic Analysis Group) (Aug. 6,

[Footnote continued on next page]

Cable operators should be required to immediately comply with any further rate reductions the Commission orders as a result of a recalculation of the competitive rate differential.

CONCLUSION

Congress required that the Commission establish "reasonable" rates for cable service in areas not subject to effective competition. Congress intended that such rates not reflect the "undue market power" of cable systems, including cable systems with a penetration rate of less than 30 percent, that do not face competition from another multichannel video programming provider. Given that the Commission's current benchmark rates are based on the inclusion of noncompetitive cable systems with penetration rates of less than 30 percent, the Commission must recalculate its benchmark rates and require cable systems to

---

[Footnote continued from previous page]
1991). Moreover, a study by the Consumer Federation of America reached a similar result, concluding that monopoly cable rates would fall by approximately one-half in a competitive market. Cable Television Regulation Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce on H.R. 1303 and H.R. 256, 102d Cong., 1st Sess. 699 (1991) (statement of Gene Kimmelman, Legislative Director of the Consumer Federation of America).

immediately comply with any further rate reductions ordered as a result.

Respectfully Submitted,

Norman M. Sinel
Patrick J. Grant
Stephanie M. Phillipps
William E. Cook, Jr.

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for the Local Governments

June 17, 1993